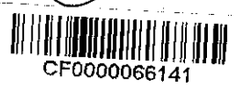
Jail Appeal

Cr.A-873/05

D.B.

APPEAL OF PRISONER

(2)



NO. 3085 NAME ओयामी मड्डा

Father's Name ओयामी बेन्नो

Residence कोलपुर (पेदमापारा) Age 39 वर्ष

Crime No. 1068/04 Police Station दरभा Session Trial No. 01/2005

Sentenced to आजीवन कारावास व 02 वर्ष सश्रम On 29.10.2005

Under section 302, 201 भा.दं.वि. कारावास by श्री पी.एन.ठेंभुरकर द्वितीय अपर सत्र न्यायाधीश बस्तर स्थान जगदलपुर।

It is explained to the Prisoner that if he states or wishes to be represented by legal practitioner the Appellate Court will not proceed with the base for seven days unless the legal practitioner appears. If the legal practitioner does not wish to be represented by legal practitioner the court may proceed at once with the case and will not be obliged to give a hearing to any legal practitioner Who should appear.

1. Date of Application for copy of Judgment No
2. Date on which ~~Appeal sent~~ Copy Received 29.10.2005
3. Date on which Appeal sent
4. Whether the prisoner wishes to be represented or not - Yes/~~No~~
5. Whether The Judgment Copy and Progress Report of The Case has given to appellant/ Counselor of The appellant Yes

No. 3085 Name ओयामी मड्डा

Confined in केन्द्रीय Jail जगदलपुर

No- 4274/अपराध Dated 17.11.2005

Forwarded to the CHIEF JUDICIAL MAGISTRATE जगदलपुर to gather to the proper Appellate Court.

Superintendent

No. 17/1-CJM/05 Dated 24.11.2005

Forwarded to the Hon'ble High Court of Chhattisgarh, Bilaspur.

Date of receipt in Appellate Court

(P.T.O.)

17/11

XI-HC-78

(11)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

G.A. 871, 872 and 873/

मामला क्रमांक ..... सन् 200 5

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Division Bench: -

Hon'ble Mr. L.C. Bhadoo, Ag.C.J. and
Hon'ble Mr. Sunil Kumar Sinha, J.

6-2-2007

Mr. Abhay Tiwari, counsel for the appellants.

Mr. M.P.S. Bhatia, Panel Lawyer for the State/respondent.

Criminal Appeal No.871/2005 filed by Kawasi Hadmo, Criminal Appeal No.872/2005 filed by Podyami Laxman and Criminal Appeal No.873/2005 filed by Oyami Madda are arising out of the same crime and same judgment in Sessions Trial No.1/2005, therefore, they are being disposed of by this common judgment.

Today Criminal Appeal No.871/2005 was listed for hearing on M.(Cri.)P.No.63/2007, application for suspension of sentence and grant of bail during the pendency of this appeal. As the matter is very short, therefore, with the consent of counsel for respective parties, the matter was heard for final disposal.

Though connected appeals namely, Criminal Appeal Nos.872/2005 and 873/2005 are not listed today, after being called, they were also heard for final disposal.

Oral judgment dictated on *Dais*.

P.T.O.

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मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -2-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Per L.C. Bhadoo, Ag.C.J.: -

The accused/appellants have preferred these appeals under Section 374 (2) of the Cr.P.C. questioning legality and correctness of the judgment of conviction and order of sentence dated 29-10-2005 passed by the 2nd Additional Sessions Judge, Jagdalpur in Sessions Trial No.1/2005, whereby learned Additional Sessions Judge after holding the accused/appellants guilty for commission of offence under Sections 302 & 201 of the I.P.C., sentenced each of the accused to undergo imprisonment for life and pay a fine of Rs.500/-, in default of payment of fine to further undergo R.I. for three months and to undergo R.I. for two years and pay a fine of Rs.500/-, in default of payment of fine to further undergo R.I. for three months, respectively.

The case of the prosecution, in brief, is that in the evening of 30-10-2004 on the occasion of concluding ceremony of Jagar, a local festival, some function was arranged by villagers near drain of the village in which deceased Kawasi Boti along with the accused persons also participated, there was a dispute between deceased Bot and accused Kawasi Hadmo, therefore, on account of that dispute the accused persons first attacked the deceased with hands, fists & foot, thereafter, tied a towel around the neck of Boti, committed his murder and threw his body in the water of the drain. Smt. Bitam, wife of Boti, lodged merg intimation Ex.P-12 in Police Station: Darbha to the effect that on Saturday at about 5.30 p.m. accused Hadmo took her husband from their residence saying that they are going for watching the

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -3-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

concluding ceremony of Jagar. When her husband did not return whole night, in the morning she went to the house of Hadmo to enquire about the whereabouts of her husband, but he did not disclose anything to her, thereafter, her neighbour Somdi came and informed that the body of her husband is lying in the water of Munga river drain. On hearing this, she along with Village Kotwar and other persons went to the drain and saw that the body of her husband was lying in the water of the drain, there was an injury on the head.

On receiving this report, the Investigating Officer left for the scene of occurrence. After giving notice to the Panchas, inquest Ex.P-7 on the body of Kawasi Boti was prepared. He also prepared the site plan (Ex.P-5) of the place of occurrence. The water of the drain where the body was lying was seized in a bottle under Ex.P-4, the towel which was tied around the neck of deceased Boti was seized under Ex.P-3 and the torch was seized under Ex.P-2 at the instance of accused Kawasi Hadmo in pursuance of memorandum Ex.P-1. The body of Kawasi Boti was sent for post-mortem to Community Health Centre, Darbha under Ex.P-16 where Dr. A.K. Jena (PW-5) conducted post-mortem, prepared the post-mortem report Ex.P-11 and opined that the death was due to injury to vital organs, haemorrhage and shock. Dehati Nalishi Ex.P-13 was given by Assistant Police Inspector G.R. Baghel and based on that, first information report Ex.P-14 was registered for commission of offence under Section 302 read with Section 34 of the I.P.C.

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मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -4-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

After completion of investigation, charge sheet was filed against the accused persons in the Court of Judicial Magistrate, First Class, Jagdalpur, who in turn committed the case to the Sessions Judge, Jagdalpur, from where learned 2nd Additional Sessions Judge received the case on transfer for trial.

The prosecution in order to establish charge against the accused persons examined six witnesses. Statements of the accused persons were recorded under Section 313 of the Cr.P.C. in which they simply denied the material appearing against them and stated that they are innocent and they have been falsely implicated in the crime.

Learned Additional Sessions Judge after hearing counsel for respective parties, convicted and sentenced the appellants as aforementioned.

We have heard Mr. Abhay Tiwari, learned counsel for the appellants and Mr. M.P.S. Bhatia, learned Panel Lawyer on behalf of the State/ respondent.

Mr. Abhay Tiwari has not disputed the homicidal death of Kawasi Boti. Moreover, Dr. A.K. Jena (PW-5) who conducted post-mortem on the body of Kawasi Boti has stated in his evidence that on 1-11-2004 at about 10 a.m. he conducted post-mortem on the body of Kawasi Boti and found following injuries: -

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -5-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

1) Crushed injury between the 4th & 5th toe of right foot in the size of 2.5 cms. x 2 cms. x 1 cm.
2) Abrasion on the forehead above the right eye in the size of 5 cms. x 1.5 cms. x 0.5 cm.
3) Abrasion on the skull in the size of 0.5 cm. x 0.2 cm.
4) Abrasion on the scrotum in the size of 4.5 cms. x 0.5 cm.
5) Abrasion on the knee of left leg in the size of 2.5 cms. x 1 cm.
6) Abrasion on the neck below the left jaw in the size of 6 cms. x 1.5 cms. x 0.5 cm.
7) The brain was congested at the place where there was injury. Scrotum was congested. 10th & 11th ribs were found fractured.
8) There was a cut in the middle of liver in the size of 5 cms. x 1 cm. length and was ruptured, the ruptured portion was congested.
9) There was blood in large and small intestine.

Injuries were ante-mortem in nature. There was a towel around the neck of the deceased. In the doctor's opinion, the cause of death was on account of haemorrhage, shock and injury to liver. Therefore, in view of the above, it is established that the death of Boti was homicidal in nature.

As far as involvement of the accused persons in the crime in question is concerned, in this case there is no direct or ocular evidence. Whole case rests on the circumstantial evidence. As per the settled law, in order to convict an accused based on the circumstantial evidence, the Hon'ble Apex

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -6-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Court in the matter of **Dhananjoy Chatterjee vs. State of W.B.** reported in **(1994) 2 SCC 220** held that:

> "In a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof."

In the present case, the prosecution has tried to establish involvement of the accused/appellants in the crime in question on the following circumstances: -

1. that, there was dispute between accused Kawasi Hadmo and deceased Kawasi Boti regarding the land;
2. that, accused Hadmo took deceased Boti from his residence at about 5.30 p.m. on 30th October, 2004; and
3. that, the accused persons made extra judicial confession before the Panchayat in presence of Balihar Singh (PW-3) & Mithuram (PW-4).

As far as the first circumstance is concerned, Smt. Kawasi Bitam (PW-1), wife of the deceased, in para 4 of her evidence has stated that

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -7-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

there was a dispute of her husband with the accused persons regarding land. Balihar Singh (PW-3) has stated in his evidence that accused Laxman disclosed before the Panchayat that in the night on account of land dispute, accused Hadmo and deceased Boti were talking. Mithuram (PW-4) in para 6 of his evidence has stated that there was a dispute between Hadmo and the deceased in connection with land and on account of that, accused Hadmo and his associates committed the murder of Boti. Therefore, in view of the above evidence, it can be held that there was some dispute regarding land between accused Hadmo and deceased Boti. It has come in the cross-examination of Smt. Kawasi Bitam (PW-1), wife of the deceased, that accused Hadmo is son of her maternal uncle, accused Laxman is her elder brother's son and accused Madda is son of her grand father. Therefore, the accused persons are closely related to the deceased and as per the above evidence, there was dispute with Hadma regarding land.

As far as the second circumstance is concerned, Kawasi Lakhma (PW-2) has stated in his evidence that it was disclosed to him by wife of the deceased that in the evening the accused persons had taken deceased Boti from his house along with them. Balihar Singh (PW-3) has stated that in the Panchayat accused Laxman disclosed that deceased Boti was with them and there was some altercation between accused Hadmo & deceased Boti regarding land dispute. Therefore, in view of the evidence of Kawasi Lakhma (PW-2) and the extra judicial confession made by accused Laxman before Balihar Singh (PW-3) in the Panchayat, it is established that accused Hadmo took the deceased from his house with him in the evening.

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -8-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

As far as the third circumstance extra judicial confession is concerned, in order to place reliance on the extra judicial confession, the prosecution is required to establish that the extra judicial confession was voluntary, true and prompt.

Mr. Abhay Tiwari, learned counsel for the accused/appellants argued that in the evidence of Balihar Singh (PW-3) & Mithuram (PW-4) it has come on record that when the accused persons made extra judicial confession in the Panchayat, the Police was present. He further argued that had the accused persons made extra judicial confession in the Panchayat, then this fact ought to have been mentioned in the inquest report Ex.P-7 which was prepared in the evening of 31st October, 2004, but there was no mention in the said inquest report Ex.P-7 regarding the extra judicial confession made by the accused persons in the Panchayat, as such, the theory of extra judicial confession made by the accused persons before the Panchayat has not been established beyond reasonable doubt.

On the other hand, Mr. M.P.S. Bhatia, learned Panel Lawyer supported the judgment of the trial Court.

We have perused the evidence of Balihar Singh (PW-3). He has stated that Panchayat was convened, in that Panchayat, accused Laxman made extra judicial confession that deceased Boti was with them and there was an altercation between deceased Boti & accused Hadmo in connection with land dispute. Thereafter, they called accused persons Hadmo & Madda

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश —9—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

in the Panchayat and in that Panchayat, those accused persons also made confession that they have committed the murder of Kawasi Boti. In cross-examination para 11, this witness has further stated that it is correct to say that Podyami Laxman, Kawasi Hadmo & Oyami Madda made extra judicial confession on account of fear that the Police may give beating. It is correct to say that on second day the Police came in the village.

Mithuram (PW-4) in para 4 of his evidence has stated that Panchayat was convened in the village in which he along with Balihar Singh, Kotwar, Gadru, Ward Panch and the accused persons were present. Before the Panchayat, accused persons Hadmo, Laxman & Madda disclosed that after committing the murder of Kawasi Boti, they threw him in the drain. In para 17 of his examination, he has stated that it is correct to say that in the first instance, the accused persons were saying, they do not know anything, but later on, on account of fear of Police they disclosed everything.

Therefore, from the above evidence of these two witnesses (PW-3 & PW-4), it cannot be said that the said extra judicial confession was made in presence of the Police. Defence has not been able to elicit any circumstance in cross-examination of these two witnesses to show that the accused persons made extra judicial confession in presence of the Police.

Now, the question remains as to whether the extra judicial confession was voluntary. Both these witnesses have stated that the accused persons made extra judicial confession on account of fear of the Police and therefore, it cannot be termed as extra judicial confession. Merely on the

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश —/C·	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

basis of evidence of the witnesses that on account of fear of Police the accused persons made extra judicial confession, it cannot be said that the said confession was not voluntary. The persons who are involved in a crime always have fear that they may be caught in the crime, therefore, such fear cannot be said to be affecting the voluntariness of the confession made by the accused persons. There is nothing in the cross-examination or in the evidence of these witnesses that they had threatened the accused persons that if they are not going to disclose or confess 'how Kawasi Boti was killed', then they will be handed over to the Police and the Police will give beating to them or they will be implicated in crime by the Police. Therefore, mere fact that there was fear of Police in the mind of the accused persons, the confession made by them cannot be said to be involuntary. Moreover, truthfulness of the confession is corroborated by the fact that there was a dispute between accused Hadmo and deceased Boti in connection with land. Apart from that, the deceased was seen in company of the accused persons where Jagar was being celebrated near the place of occurrence.

In the circumstances, for the foregoing reasons, we are of the considered opinion that the extra judicial confession made by the accused persons before the Panchayat in the presence of these two witnesses namely, Balihar Singh (PW-3) & Mithuram (PW-4), was voluntary and true.

As far as the argument advanced by learned counsel for the appellants that there is no mention of extra judicial confession made by the accused persons in the inquest report Ex.P-7 is concerned, as per the

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -11-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

record, the inquest report was prepared on 31st October, 2004, no time is mentioned in it and in cross-examination of these two witnesses (PW-3 & PW-4) defence has not been able to elicit any circumstance which shows that this inquest report was prepared after the Panchayat was held in which the accused persons made extra judicial confession, as such, non-mentioning of the *factum* of extra judicial confession made by the accused persons in Ex.P-7 does not make any difference, as there is nothing on record that the extra judicial confession was made before Ex.P-7 was prepared.

Perusal of Dehati Nalishi Ex.P-13 shows that the Assistant Sub Inspector who lodged the Dehati Nalishi has categorically mentioned about the story of the incident that the deceased along with the accused persons took their meal near the place of occurrence, next day morning, the body of deceased Boti was seen in the Nala near the place where the accused persons and the deceased were taking their meals on the day of the festival of Jagar in the night. Next day morning, Somdi Bai informed wife of the deceased about the body lying in the drain. It has also been mentioned that in the Panchayat the accused persons made extra judicial confession regarding the commission of crime. The said Dehati Nalishi was given on 1-11-2004 at 12.30 p.m.

Therefore, we are of the considered opinion that the trial Court has rightly placed reliance on the evidence of the prosecution that the accused persons made extra judicial confession regarding commission of crime

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -12-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

before the Panchayat in presence of Balihar Singh (PW-3) & Mithuram (PW-4).

For the foregoing reasons, the prosecution has been able to establish on the basis of the circumstantial evidence adduced that the chain of circumstances is complete and an irresistible conclusion can be drawn that the accused persons were the authors of the crime in question, there is no possibility of coming of any third person in between and committing the crime in question.

In the result, the appeals (Criminal Appeal Nos.871/2005, 872/2005 & 873/2005) being devoid of merit, are liable to be dismissed and they are hereby dismissed.

Consequently, M.(Cri.)P.No.63/2007 stands disposed of.

Sd/-
L.C.BHADOO
Judge

Sd/-
Sunil Kumar Sinha
Judge

P.T.O.